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No. 78-708

In the Supreme Court of the United States

OCTOBER TERM, 1978

MERLE O. GREENE, JR. and
JULIA GREENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 583 F. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1978. A petition for rehearing was denied on September 28, 1978. The petition for a writ of certiorari was filed on October 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed reversible error in refusing to sever petitioner Julia Greene's trial from that of petitioner Merle Greene.

2. Whether the district court erroneously instructed the jury with respect to the admissibility of co-conspirator declarations.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners Julia and Merle Greene[1] were convicted of conspiracy to commit mail fraud and various substantive mail fraud charges, in violation of 18 U.S.C. 371 and 1341. Petitioner Merle Greene was sentenced to two years' imprisonment on one of the substantive counts, to be followed by concurrent three-year terms of probation on each of the remaining counts. Petitioner Julia Greene was sentenced to concurrent three-year terms of probation on the conspiracy count and on the one substantive count on which she was found guilty. The court of appeals reversed petitioners' conspiracy convictions and affirmed their convictions on the substantive counts (Pet. App. A1-A26).[2]

The evidence is set out in detail in the opinion of the court of appeals (Pet. App. A10-A19). In brief, the government showed that during the period from January 1, 1973, to August 1, 1975, Merle Greene submitted a number of claims against various insurance companies arising out of purported automobile accidents, burglaries, and thefts.

One of the claims filed by petitioner Merle Greene was supported by a forged work-loss letter stating that he had lost 108 hours of work because of an accident on July 4,

[1]Petitioner Merle Greene is the son of petitioner Julia Greene (Pet. App. A3).

[2]Petitioners were tried together with co-defendant Carolyn Porter Fuel. Fuel was convicted of conspiracy and three substantive mail fraud violations. The court of appeals affirmed her conviction on one of the substantive counts, but it reversed her convictions on the conspiracy count and on two of the substantive counts.

1974. Petitioner's work records reflected that he had actually missed only 13½ hours out of the claimed 108 hours and that he was paid for 4½ hours of that time (Tr. 106, 145-146, 151, 153-154, 163; Govt. Exh. 110, 191). That claim, for which he received $2,500 in settlement, formed the basis of count two of the indictment (Tr. 133, 136).

The evidence further showed that petitioner Merle Greene caused his attorney to mail medical reports to support insurance claims arising from accidents that he claimed had occurred on October 22, 1974, and February 10, 1975 (Tr. 228, 274). The medical reports relating to both claims were shown not to be genuine (Tr. 228, 237-238, 297-300, 315-316, 392-393). The medical report submissions formed the basis for the charges in counts 3 and 4 of the indictment.

Petitioner Merle Greene also caused his attorney to mail to the Hertz Rental Company on petitioner's behalf an invoice in the amount of $1,364.53—the purported amount of the damage resulting from the incident on February 10 (Tr. 364; Govt. Exh. 119). The invoice turned out to be an altered version of a repair estimate that had been submitted to another insurance company in connection with a previous accident (Tr. 343-344, 389). Petitioner submitted the same bill to a third insurance company to support a second claim arising out of the alleged February 10 accident (Tr. 276, 389, 438). Count 5 of the indictment was based on that submission.

Petitioner Merle Greene also submitted claims to two insurance companies in connection with an alleged burglary at his residence on December 2, 1973, and an automobile larceny allegedly occurring on September 9, 1975. In support of the burglary claim, petitioner enclosed numerous documents and receipts, 39 of which were copies of items he had previously submitted to another insurance company in support of an alleged burglary at the same residence on January 1, 1973 (Tr. 187, 496, 498,

511). He received $4,750 as a result of the first claim and $2,500 as a result of the second (Tr. 804). Count 6 of the indictment was based on the burglary claim. The automobile larceny claim was made on a homeowner's policy obtained by petitioner on his representation that he owned his residence, which in fact he only rented (Tr. 447-448, 460, 727). That claim was the basis of count 8 of the indictment.

Finally, the evidence established that petitioners Merle and Julia Greene submitted various documents in support of an alleged burglary of Julia Greene's apartment on April 23, 1975. Several of the documents had previously been altered and submitted as documentation for an alleged burglary of co-defendant Carolyn Fuel's residence (Tr. 522, 543, 555, 564-565, 567). Several of the receipts supporting the claim were supplied to Julia Greene by Merle Greene (Tr. 568-569).

ARGUMENT

1. Petitioners contend that the reversal of their convictions on the conspiracy count "resulted in a misjoinder of offenses and defendants under Rule 8, Federal Rules of Criminal Procedure" (Pet. 13). As the court of appeals noted, however, petitioners never contested their initial joinder (see Pet. App. 19-20 n.10). Moreover, after initially joining defendant Fuel's motion for a severance (Tr. 380-381), petitioners' counsel subsequently stated that petitioners were opposed to a severance (Tr. 919-920). Because petitioners did not preserve this issue by objecting to the joint trial, it is not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, the joinder of petitioners and co-defendant Fuel was proper under Fed. R. Crim. P. 8(b), which allows joinder of co-defendants "if they are alleged to have participated in the same act or transaction or in

the same series of acts or transactions constituting an offense or offenses." All three defendants were charged with mail fraud conspiracy, and each was charged with substantive mail fraud offenses. As the court below noted, "[i]t is permissible and also customary to join a conspiracy count with separate substantive counts * * * even though some of the alleged co-conspirators are not charged in the substantive counts" (Pet. App. A19-A20 n.10, quoting from *United States* v. *Graham*, 548 F. 2d 1302, 1310 (8th Cir. 1977).

Although the court of appeals reversed petitioners' conspiracy convictions, it is well settled that the presence of conspiracy counts renders joinder appropriate under Fed. R. Crim. P. 8—absent bad faith on the part of the government in charging conspiracy—and that the subsequent removal of the conspiracy charges, by dismissal or reversal, does not mandate a severance under Fed. R. Crim. P. 14. See *Schaffer* v. *United States*, 362 U.S. 511 (1960); *Peterson* v. *United States*, 405 F. 2d 102, 105-106 (8th Cir. 1968), cert. denied, 395 U.S. 938 (1969); *United States* v. *Catino*, 403 F. 2d 491, 495 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969); *Fernandez* v. *United States*, 329 F. 2d 899, 905-906 (9th Cir.), cert. denied, 379 U.S. 832 (1964). Moreover, the offenses with which the three defendants were charged were substantially interrelated. For example, petitioners Merle and Julia Greene together submitted documents in support of an insurance claim for a burglary of Julia Greene's home; the documents turned out to be copies of documents co-defendant Fuel had used in connection with the burglary claim on which she was convicted. See *United States* v. *Friedman*, 445 F. 2d 1076, 1082-1083 (9th Cir. 1971).

Petitioners also contend that they were prejudiced by the joint trial because the evidence against Merle Greene was stronger than the evidence against Julia Greene. In trials involving more than one defendant, the evidence

normally varies from one defendant to another, but the disparity in evidence does not by itself establish prejudice. See, *e.g.*, *United States* v. *McGruder*, 514 F. 2d 1288, 1290 (5th Cir. 1975), cert. denied, 423 U.S. 1057 (1976); *United States* v. *Rizzo*, 491 F. 2d 215, 218 (2d Cir.), cert. denied, 416 U.S. 990 (1974). In this case, however, there were only three defendants, the trial was not particularly long, and trial judge carefully instructed the jury "to give separate, personal consideration to the case of each individual defendant" (Pet. App. A21). As the court of appeals noted, there is nothing in the record to suggest that the jury was unable to evaluate the evidence against the three defendants separately, according to the court's instructions.

This case is readily distinguishable from *United States* v. *Kelly*, 349 F. 2d 720, 756-759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), upon which petitioners rely. The court in *Kelly* held that severance should have been granted because a very thin case against one defendant was unfairly bolstered by "spillover" from the proof against much more clearly culpable defendants. See also *United States* v. *Mardian*, 546 F. 2d 973, 977 (D.C. Cir. 1976). In this case, by contrast, there was "clear and convincing probative evidence implicating each of the appellants on certain of the substantive counts" (Pet. App. A21).

2. Petitioners contend that the trial court should have determined the admissibility of any co-conspirator declarations rather than submitting the admissibility question to the jury (Pet. 9). But petitioners acquiesced in the trial court's charge regarding the admissibility of co-conspirators' declarations (Tr. 893, 894, 1008).[3] Moreover,

[3]Petitioners assert that they objected to the court's charge with respect to the admissibility of co-conspirators' declarations (Pet. 7), but they do not refer to any place in the record that they made such an objection. The court of appeals treated their claim as a "plain error" contention (Pet. App. A25), and we have been unable to find any place in the record where such an objection was made. Petitioners did object to the government's introduction of evidence of various of the defendants' *acts* to prove that they were engaged in a conspiracy (see Tr. 493), but the court gave an instruction to the jury dealing with the government's proof of overt acts in which the court explained that the jury "may draw no inferences of wrongdoing whatsoever from evidence of an ordinary innocent overt act unless and until you are convinced beyond a reasonable doubt that the conspiracy alleged in the Indictment was willfully formed, that the person committing the overt act was a member of the conspiracy at the time the act was committed, and finally that the act itself was done to further the purpose of the conspiracy" (Tr. 494). Defense counsel agreed that the court's instruction accurately stated the law and did not object to the giving of that instruction (Tr. 491-492).

the only out-of-court statements by any of the defendants that were introduced at trial were components of the fraudulent submissions that constituted the *corpus delicti* of the various mail fraud charges. Those statements were therefore not hearsay at all, irrespective of the rule regarding co-conspirator declarations, and they were properly admitted. See. Fed. R. Evid. 801(c); *United States* v. *McDonnel*, 550 F. 2d 1010, 1012 (5th Cir.), cert. denied, 434 U.S. 835 (1977); *United States* v. *Burke*, 495 F. 2d 1226, 1232 (5th Cir.), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Tyminski*, 418 F. 2d 1060, 1062 (2d Cir. 1969), cert. denied, 397 U.S. 1075 (1970).

Accordingly, the trial judge was not required in this case to make any admissibility determination, whether preliminary or conclusive. The evidence consisted primarily of documentation, expert testimony, and lay witnesses called to establish custody and identification of records. No witness took the stand to testify to any out-of-court statements by a co-conspirator inculpating another co-conspirator who was not present at the time the statement was made. Accordingly, the variance in the standards

relating to the admissibility of co-conspirators' declarations (Pet. 9-12) is not posed in this case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]In any event, as the court of appeals observed, the Eighth Circuit has held that its decisions interpreting Rule 104(a) to require the judge to determine admissibility are to be applied only prospectively. See *United States* v. *Bell*, 573 F. 2d 1040, 1044-1045 (8th Cir. 1978); *United States* v. *Macklin*, 573 F. 2d 1046, 1048-1049 (8th Cir.), cert. denied, No. 77-6895 (October 2, 1978); see also *United States* v. *Martorano*, 557 F. 2d 1, 11 (1st Cir.), affirmed on rehearing, 561 F. 2d 406 (1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *James*, 576 F. 2d 1121, 1132 (5th Cir. 1978); *United States* v. *Enright*, 579 F. 2d 980, 986-987 (6th Cir. 1978); *United States* v. *Santiago*, 582 F. 2d 1128, 1135 (7th Cir. 1978).

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